United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

783

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

No. 22,551

UNITED STATES OF AMERICA, Appellee

v.

EUGENE CARTER, Appellant

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLANT

Fred D. Turnage
Roger D. Chittum

1250 Connecticut Avenue, N.W.
Washington, D. C. 20036

Counsel for Appellant
(Appointed by this Court)

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ISSUES PRESENTED

1. Whether it was error or, alternatively, plain error to instruct the jury that ordinary negligence, rather than gross negligence or recklessness, was the proper mens rea standard for manslaughter.

2. Whether it was plain error to instruct the jury that appellant had the burden of proving the homicide was accidental.

3. Whether it was plain error to instruct the jury that appellant must be convicted of manslaughter if he was engaged in any unlawful act at the time of the accidental shooting, without instructing that such unlawful act must have been both inherently dangerous to life and the direct cause of death.

(This case has not previously been before this (Court.)

REFERENCES TO RULINGS

None

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STATEMENT OF THE CASE

On January 3, 1968, appellant, Eugene Carter, was charged in a three-count indictment with second-degree murder (D.C. Code § 22-2403), involuntary manslaughter (D.C. Code § 22-2405), and carrying a pistol without a license (D.C. Code § 22-3204). A jury trial was held October 8 and 9, 1968, and appellant was acquitted of murder but found guilty of manslaughter and carrying a pistol without a license. He was sentenced on December 6, 1968, to a term of five to fifteen years for manslaughter

and twelve months for carrying a pistol without a license, the sentences to run concurrently. On December 9, 1968, appellant filed a Notice of Appeal and was granted leave to appeal in forma pauperis. Only the manslaughter conviction is attacked on appeal.

Appellant and the deceased had known each other for four or five years. Tr. 79, 84. Their relations had always been friendly (Tr. 79, 99), and there had never been any animosity or anger between them. Tr. 83.

At about seven o'clock in the evening of November 3, 1967, appellant, the deceased, and Sam Pendleton began drinking together. Tr. 79. At about eleven o'clock they left the house and separated briefly. Tr. 79. Appellant, who was on his way to make a phone call, met an acquaintance who asked appellant to lend him ten dollars and gave him a pistol as security. Tr. 79-80, 92-93. Appellant then rejoined the deceased in the alley where they resumed drinking (Tr. 80) until the deceased was fatally shot just before two o'clock in the morning.

Throughout the course of the evening (Tr. 41), the three participants engaged from time to time in episodes of mock combative activity which all the witnesses described as "playing." Tr. 20-21, 32, 40-41, 42, 80. This "play"

included pushing (Tr. 21, 24, 46), hitting (Tr. 32, 41, 80, 82), "passing" (Tr. 41), punching (Tr. 21, 32, 36, 46), wrestling (Tr. 21, 32, 80, 82), and challenges and counter-challenges by one that he could best the other (Tr. 21, 23, 81, 82). Although the evidence suggests a rather rough form of "play," all witnesses agreed that they were "playing" or "horsing around" (Tr. 40) and not fighting. Tr. 41.

In the final 25 minutes or less before the fatal shooting (Tr. 25-26, 54), this "play" continued. Sam Pendleton, who had left the scene temporarily, returned and, interrupting the "playing" of appellant and the deceased, "played" with appellant by advancing on him with a piece of two by four lumber. Pendleton broke off this episode, dropped the two-by-four, and stepped away while appellant and the deceased resumed their "play." Tr. 40-42, 81-82. Then the deceased picked up the two-by-four and advanced on appellant saying, "Yes, well, if Sam don't do anything to you, I will." Tr. 82. The deceased subsequently put down the two-by-four, and, in the final seconds before the shooting, he advanced on appellant with his hand in his pocket. Appellant grabbed the pocket, spun the deceased around (Tr. 82), and may have held his shoulder with his right hand. Tr. 23, 43. At

this time appellant held up in his left hand the gun which had been in his pocket. Tr. 82-83. The deceased, with his back to appellant, began to pull on appellant's left wrist and wrestle for the gun (Tr. 83) while yelling to Pendleton, "Tell Red Mike [appellant's nickname] stop playing with the gun," (Tr. 42) or "He's got a gun," and "Turn me loose." Tr. 22, 32-33. At this point appellant's left arm struck the deceased's shoulder and the gun discharged. Tr. 83, 95-97. The bullet struck the deceased just behind the left ear and caused his death.

Appellant caught the deceased as he fell and held him in his arms. Tr. 36-37. He exclaimed, "God knows I didn't mean to shoot him" (Tr. 24) or "Oh, Lord, I shot this man. I didn't mean to shoot him." Tr. 32-33, 46-47, 83. Appellant immediately sent one of the witnesses to call an ambulance. Tr. 24, 33, 47, 83. Appellant then left the scene before the police arrived and was not arrested until two months later.

Appellant testified that he did not intend to shoot the deceased or knowingly point the gun at him and that it was an accident. Tr. 83, 85-86, 96. He further testified that he was not familiar with guns or their operation and did not know that the pistol he had received a few hours earlier was loaded. Tr. 89,

94-95. One Government witness testified that appellant did not appear to be angry at the deceased (Tr. 21), and there was no testimony to the contrary.

ARGUMENT

I. The court erred in instructing the jury that a conviction of manslaughter could be based on ordinary negligence, rather than gross negligence or recklessness as the law requires.

(Tr. 127-29)

The court repeatedly and unequivocally instructed the jury that it should convict defendant of manslaughter if defendant's conduct amounted to ordinary negligence. Tr. 127-29. Not only was the charge entirely devoid of such phrases as "gross negligence," "criminal negligence," and "recklessness," but it defined "negligence" in terms of the reasonable, prudent man test applicable in tort cases:

> "Negligence" may be defined as the doing of some act which a reasonably prudent person would not do, or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs.

Tr. 129. See also Tr. 128 where the court referred to "that care and caution which would be exercised by the

ordinarily careful and prudent individual under like circumstances."

This was erroneous. In order to convict one of involuntary manslaughter, it must be established that the homicide was caused by conduct which was reckless or at least grossly negligent. The concurring opinion of Judge Leventhal in United States v. Dixon, U.S. App. D.C. No. 22,324 (March 27, 1969), makes clear that, in instructing the jury on involuntary manslaughter,

> care must of course be taken that a verdict is not based on simple negligence. As Professor Wechsler points out:
>
> > The ultimate issue is conceived to be whether the actor's failure to perceive the risk "involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." Much more than the "ordinary negligence" of tort law is thus deemed to be involved.

Id., slip opinion at 9 (footnote omitted). A square holding to this effect may be found in Nestlerode v. United States, 74 App. D.C. 276, 122 F.2d 56 (1941).

> It is quite true that negligence on which manslaughter can be predicated must be extreme, and hence it is not unusual to speak of the neglect of legal duty as "gross" or "wanton". But we think that the use of the words "culpable negligence of a legal duty", when considered in

> connection with the balance of the charge, indicated to the jury that "culpable" was used by the court to mean "wanton" and "gross". Several times in its charge the court mentioned that gross negligence is necessary for a conviction of manslaughter, and the court also specifically instructed the jury that if the defendant's negligence was not "gross", then he could be found guilty only of negligent homicide."

Id. at 279, 122 F.2d at 59.

In Story v. United States, 57 App. D.C. 3, 16 F.2d 342 (1926), cert. denied, 274 U.S. 739 (1927), this Court referred to the standard of culpability for involuntary manslaughter as "careless and reckless," "recklessly and negligently," "criminal negligence," and "criminal carelessness." In United States v. Geare, 54 App. D.C. 30, 293 F. 997 (1923), the standard referred to was "criminal negligence." The opinion in Sinclair v. United States, 49 App. D.C. 351, 265 F. 991 (1920), while not addressed to this issue discloses that the trial court there charged the jury in terms of "gross negligence" and "reckless negligence." And it should be noted that the indictment in the case at bar charges defendant with acting "wantonly, and with gross negligence."[1/]

1/ On or about November 4, 1967, within the District of Columbia, Eugene Carter feloniously, wantonly, and with gross negligence, did shoot Larry Coleman, thereby causing injuries to the said Larry Coleman, from which he did die on or about November 4, 1967.

The foregoing authorities have a sound basis in the common law which was imported into the District of Columbia through the law of Maryland and still prevails here. Fuller v. United States, ___ U.S. App. D.C. ___, 407 F.2d 1221 (1968) (en banc); Marcus v. United States, 65 App. D.C. 298, 86 F.2d 854 (1936). Like the District of Columbia Code, the Maryland Code does not define manslaughter but merely prescribes the penalty. Md. Ann. Code art. 27, § 387. The common law definition of the crime still prevails in Maryland. Connor v. State, 225 Md. 543, 558 , 171 A.2d 699, 707, cert. denied, 368 U.S. 906 (1961); State of Maryland v. Chapman, 101 F. Supp. 335 (D. Md. 1951). The common law rule as perceived in Maryland is succinctly stated in the Chapman case, just cited. In this manslaughter prosecution removed from the state court, the substantive law of Maryland was applied and set forth as follows:

> In my view the law is reasonably clear that a charge of manslaughter by negligence is not made out by proof of ordinary simple negligence that would constitute civil liability. In other words, the amount or degree or character of the negligence to be proven in a criminal case is gross negligence, to be determined on the consideration of all the facts of the particular case, and the existence of such gross

> negligence must be shown beyond a reasonable doubt. If the resultant deaths were merely accidental or the result of a misadventure or due to simple negligence, or an honest error of judgment in performing a lawful act, the existence of gross negligence should not be found.
>
> In a succinct and well prepared brief counsel for the State has aptly expressed the matter in saying that the question is whether the conduct of the defendant, considering all the factors of the case, was such that it amounted to a "wanton or reckless disregard for human life."

Id. at 341 (emphasis in original). This language has been quoted or cited with approval by the Maryland Court of Appeals on at least two occasions. Hughes v. State, 198 Md. 424, 84 A.2d 419 (1951); Duren v. State, 203 Md. 584, 102 A.2d 277 (1954). On other occasions, the Maryland Court of Appeals has approved the "gross negligence" or "wanton and reckless" standards without citing the Chapman case. Palmer v. State, 223 Md. 339, 351 , 164 A.2d 467, 473 (1960); Chase v. Jennifer, 219 Md. 564, __ , 150 A.2d 251, 254 (1959); Connor v. State, supra.

The Federal courts have also held that the common law standard of culpability for involuntary manslaughter is gross negligence or recklessness. In reversing a

conviction under 18 U.S.C. § 1112,[2/] the opinion in United States v. Pardee, 368 F.2d 368 (4th Cir. 1966), quotes from Chapman and expressly approves that opinion "as an accurate exegesis of the law of involuntary

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2/ 18 U.S.C. § 1112(a) (1964) provides:

> Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:
>
> Voluntary--Upon a sudden quarrel or heat of passion.
>
> Involuntary--In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

This section is substantially identical to section 274 of the Act of March 4, 1909, ch. 321, 35 Stat. 1143. Prior to 1909, Rev. Stat. § 5341 (1874) and its antecedent, Act of March 3, 1857, ch. 116, 11 Stat. 250, defined manslaughter as "unlawfully and willfully, but without malice," injuring another causing his death. An earlier statute, Act of April 30, 1790, ch. 9, § 7, 1 Stat. 113, simply specified the penalty for manslaughter without defining it.

The committee reports accompanying the bill which became the 1909 Act state that the definition of manslaughter found there "enlarges the common law definition." Sen. Rep. No. 10, 60th Cong., 1st Sess. 24 (1908); H.R. Rep. No. 2, 60th Cong., 1st Sess. 24 (1908). And, it has been held that the terms used in the statute must be interpreted by reference to the common law. United States v. Pardee, 368 F.2d 368, 374 (4th Cir. 1966).

manslaughter from the origin of the crime to the present time." Id. at 374. Pardee, however, sets forth an even more rigorous definition of gross negligence:

> "Gross negligence" is to be defined as exacting proof of a wanton or reckless disregard for human life. Furthermore, to convict, the slayer must be shown to have had actual knowledge that his conduct was a threat to the lives of others, or to have knowledge of such circumstances as could reasonably be said to have made foreseeable to him the peril to which his acts might subject others. The reason of the latter comment is that awareness of the tendency to danger, or the foreseeability of injury, from the act or omission is an indispensable element of negligence.

Ibid.

The majority rule in other states is in accord with District of Columbia, Maryland, and Federal rule that ordinary negligence is not a sufficient basis for a manslaughter conviction. See 40 Am. Jur. 2d, Homicide § 92 (1968).

Finally it should be pointed out that, if ordinary negligence resulting in death were held to constitute manslaughter, two sections of the District of Columbia Code would be rendered meaningless. D.C. Code § 40-606 defines the misdemeanor of negligent homicide by

vehicle[3] which is expressly declared in § 40-607 to be a lesser included offense within the crime of manslaughter.[4] These sections, particularly the lesser included offense provision, are irreconcilable with the proposition that ordinary negligence is the proper standard of culpability for common law manslaughter. See Nestlerode v. United States, supra.

3/ D.C. Code § 40-606 provides in relevant part:

> Any person who, by the operation of any vehicle at an immoderate rate of speed or in a careless, reckless, or negligent manner, but not wilfully or wantonly, shall cause the death of another, shall be guilty of a misdemeanor, and shall be punished by imprisonment for not more than one year or by a fine of not more than $1,000 or both.

4/ D.C. Code § 40-607 provides:

> The crime of negligent homicide defined in section 40-606 shall be deemed to be included within every crime of manslaughter charged to have been committed in the operation of any vehicle, and in any case where a defendant is charged with manslaughter committed in the operation of any vehicle, if the jury shall find the defendant not guilty of the crime of manslaughter such jury may, in its discretion, render a verdict of guilty of negligent homicide.

Having demonstrated that the instruction on negligence was clearly erroneous, it is obvious that the error was highly prejudicial to appellant. The jury could have believed appellant's testimony that he did not knowingly point the gun at the deceased (Tr. 86, 97), and it could have believed that it was the deceased's own foolhardy grab for the gun which caused his death. On these facts, the jury could have found that some slight degree of negligence on the part of appellant contributed to the fatal accident. But, on these same facts, it very likely would have acquitted appellant if it had been applying a gross negligence or recklessness standard. At the very least, there is a substantial probability that an acquittal would have resulted from a proper instruction.

II. <u>The court erred in instructing that appellant had the burden of proving he was not negligent.</u>

(Tr. 127-29)

After instructing the jury on the elements of voluntary manslaughter, the court instructed on the "defense" of accidental homicide. Tr. 127-29. It was only in this inverted fashion that the court even purported to cover the elements of involuntary manslaughter. The accidental homicide instruction very clearly placed on

appellant the burden of persuading the jury that he was not negligent.

> In other words, in order to claim that a thing is accidental, you have to demonstrate yourself that there was no negligence on your part.

Tr. 128. This instruction not only shifted the burden from the Government to the defendant on this issue, but it did not tell the jury what standard of proof to apply--preponderance of the evidence, beyond a reasonable doubt, or other. Since the only standard of proof mentioned elsewhere in the charge is the beyond-a-reasonable-doubt standard, the jurors likely assumed that not only was appellant required to prove he was not negligent, but he was required to prove it beyond a reasonable doubt. There are no District of Columbia cases directly in point, but decisions in Maryland, in other Federal jurisdictions, and in the majority of the other states agree that it is erroneous to cast upon the defendant the burden of persuasion on this issue. Moreover, although a few states have imposed the burden of persuasion on the defendant with respect to this issue, none requires the defendant to prove beyond a reasonable doubt that the killing was accidental.

Maryland law, the relevance of which is discussed at 8 supra, requires the prosecution in an involuntary manslaughter case to prove beyond a reasonable doubt that the defendant was grossly negligent. State of Maryland v. Chapman, supra, was a removed Maryland prosecution of an Air Force pilot for manslaughter arising out of a plane crash occurring after the pilot bailed out. In applying Maryland law, the District Judge held the prosecution to the reasonable doubt standard on the gross negligence issue and found the defendant not guilty.

> Should it be held in this case that the defendant should have reasonably anticipated the probability that the plane would circle and swerve, as it did, back into an area almost directly opposite to the course on which it was set when the pilot abandoned it? The burden of establishing an affirmative answer to this question beyond a reasonable doubt is on the prosecution.

Id. at 340. See also Palmer v. State, 223 Md. 341, 351, 164 A.2d 467, 473 (1960), where the opinion discloses that the trial judge imposed the reasonable-doubt burden on the prosecution with respect to the gross negligence issue.

Since the crime of involuntary manslaughter within the territorial jurisdiction of the United States (18

U.S.C. § 1112) is, in substance, an enactment of the common law (see note 2 supra), a decision of another Federal court concerning it should be most persuasive in determining what the common law rule is in the District of Columbia. The Court of Appeals for the Fourth Circuit, in reversing a conviction under 18 U.S.C. § 1112, has held the prosecution must prove gross negligence beyond a reasonable doubt. United States v. Pardee, supra.

> Mistake or inadvertence of Pardee in turning his car to the north while in the southbound roadway would not necessarily excuse him, and the Court rightfully refused to charge unqualifiedly on these contentions. Actually, either of these possibilities could constitute gross negligence and thus provide this element of involuntary manslaughter. However, these considerations will be embodied, and are fairly submitted, in the admonition to the jury that it may not convict unless it believes beyond a reasonable doubt that the wrongway driving was the result of more than simple negligence--that it must amount to wanton and reckless disregard for human life, or conduct in itself imperilling the safety of another on the Parkway.

368 at 375.

Authorities in other jurisdictions are in accord. The better reasoned decisions agree that asserting the "defense" of accidental death is nothing more than a

denial of the essential mens rea element of the prosecution's case, i.e., that the defendant's conduct was sufficiently blameworthy to warrant his conviction of a serious felony. E.g., State v. Fowler, 268 N.C. 430, 150 S.E.2d 731 (1966); State v. McDaniel, 68 S.C. 304, 47 S.E. 384 (1904); State v. Cross, 42 W.Va. 258, 24 S.E. 996 (1896). Therefore, the prosecution must bear the usual burden of persuasion on this issue. The "defense" of accident is no more a defense than taking the position that someone else pulled the trigger--both are simply theories, on what happened and how it happened, submitted to the jury by the defendant. The majority rule in other states appears to be in accord with the cases already cited. See, e.g., Jackson v. Superior Court, 62 Cal. 2d 521, 399 P.2d 374 (1965); State v. Matheson, 130 Iowa 440, 103 N.W. 137 (1905); State v. Graffam, 202 La. 869; 13 So. 2d 249 (1943); State v. Budge, 126 Me. 223, 137 A. 244 (1927); State v. Gardner, 51 N.J. 444, 242 A.2d 1 (1968); Commonwealth v. Deitrick, 221 Pa. 7, 70 A. 275 (1908).

The contrary rule prevailing in some jurisdictions with respect to some, but usually not all, "affirmative defenses" is attributable to a failure to distinguish

between the burden of going forward with the evidence and the burden of persuasion.[5/] For example, in a larceny case, when the prosecution has proved the defendant had possession of recently stolen property, this is sufficient to permit the jury to draw the inference that the defendant was the thief. See Pendergrast v. United States, U.S. App. D.C. No. 21,031 (Jan. 31, 1969). Since this inference is permitted, the defendant is faced with the practical necessity of introducing some evidence that he acquired the property innocently in order to reduce the very substantial risk that he will be convicted. However, holding that there is sufficient evidence to support a conviction is not the same as directing the jury to convict unless the defendant puts in certain evidence. There is no sound reason why the ultimate burden of persuasion should follow the transient burden of going forward with the evidence.[6/] Indeed,

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5/ This distinction was first pointed out by Professer Thayer. J. B. Thayer, Preliminary Treatise on Evidence 353-89 (1898).

6/ It has been pointed out that the distinction between the two burdens was blurred in earlier times by the common law practice of special verdicts. G. P. Fletcher, Two Kinds of Legal Rules: A Comparative Study of Burden-of-Persuasion Practices in Criminal Cases, 77 Yale L.J. 880 (1968).

placing the burden of persuasion on the defendant on an issue which is central to the existence or absence of mens rea would create serious conceptual difficulties with the presumption of innocence and the general principle that the prosecution must prove guilt beyond a reasonable doubt. In any event, the modern trend is to put the burden of persuasion on the prosecution on the "affirmative defenses" as well as on the issues required to establish a prima facie case. Orfield, Burden of Proof in Federal Criminal Cases, 31 U.Mo.K.C. L. Rev. 30 (1963); G. P. Fletcher, op. cit. supra note 6.

The prejudicial effect of the misallocation of the burden of persuasion cannot be doubted, especially where, as here, the critical issue is not one of objective fact but a nebulous, unmeasurable standard of conduct fraught with moral and cultural overtones. In this latter situation the burden of persuasion is practically inseparable from the standard itself. To impose a heavy burden of proof on the defendant on such issues is the equivalent of telling the jury that a very high standard of conduct is required. Alternatively stated, the difference between proving a fact beyond a reasonable doubt and merely

creating a reasonable doubt as to that fact is enormous in a situation where some doubt is inherent in the nature of the issue.

III. The unqualified instruction to the jury that it must convict appellant of manslaughter if it found he was engaged in an unlawful act at the time the shot was fired was erroneous because the finding of unlawfulness does not per se establish the mens rea required for manslaughter; it is only evidence that the act was reckless or grossly negligent, and only then if the unlawful act was both inherently dangerous and the direct cause of death.

(Tr. 113-14, 127-28)

As previously noted, the court did not instruct on the elements of involuntary manslaughter per se, but, insofar as it instructed on this offense at all, it stated the elements in the negative by instructing on the "defense" of accident. In so doing, it charged that that defense was available only if appellant was not engaged in any unlawful act.

> I will give you the charge on accidental homicide:
>
> The killing of a human being is excusable if committed by accident and misfortune in doing any lawful act by a lawful means . . . .

Tr. 127-28.

> Consequently, if the jury finds that the defendant had no purpose to fire his revolver, but it was discharged by him accidentally, and at the time of its discharge the defendant was engaged in no unlawful act, and if it was not negligently discharged, then the act of killing was a homicide by misadventure and is no crime. If the jury finds these to be the facts, the defendant must be found not guilty.

Tr. 128. Thus, the jury was charged, in effect, that it must convict appellant of manslaughter if, at the time the fatal shot was fired, he was engaged in an unlawful act. And this clear implication of the charge was reinforced by the prosecutor's closing argument (Tr. 114):

> To be excusable homicide, members of the jury,--they talk about an accident---one must be performing a lawful act.

There are two errors in this instruction and related argument to the jury. The first is the failure to instruct that the unlawfulness of any of appellant's acts should not be considered in relation to the manslaughter charge unless such unlawful acts were the direct cause of death. Causation is not only a common sense precondition to any application of the unlawful act doctrine, but it is required by the decisions of this Court. In United States v. Interstate Properties, Inc., 80 U.S. App. D.C. 392, 153 F.2d 469 (1946), this

Court affirmed the dismissal of an indictment which failed to allege that a landlord's failure to provide a fire escape "caused or contributed to" the death of a tenant by fire. Id. at 394, 153 F.2d at 471. In full accord with this is Sinclair v. United States, 49 App. D.C. 351, 265 F. 991 (1920), where a manslaughter conviction was reversed for inadequate instructions on the causation requirement.

> The defendant was . . . charged . . . with unlawful speeding and reckless driving. If the death was not caused by those acts, or one of them, he was entitled to a verdict of not guilty . . . .

Id. at 353, 265 F. at 993.

Putting aside for the moment the causation requirement, the second error in the above instruction is that it failed to inform the jury that not every unlawful act is sufficient to sustain a manslaughter conviction. Only those unlawful acts which are inherently dangerous or manifest a reckless disregard for human life are sufficient to sustain a conviction of manslaughter without additional proof of grossly negligent conduct. Furthermore, even such unlawful acts as qualify only permit and do not require a manslaughter conviction. The rule is well stated in United States v. Pardee, supra, which

reversed a manslaughter conviction based on a fatality caused by the defendant's driving the wrong way on the Baltimore-Washington Parkway.

> Although requested to instruct the jury that the unlawful act must have one or more of these characteristics--inherent danger to life or gross negligence--the Court declined to charge in this respect. Doubtlessly it was of the opinion, and not illogically, that under the facts of the case the wrong-way driving in itself proved the knowingly and "needlessly doing [of an act] in its nature dangerous to life" or a wanton or reckless disregard for human life; therefore potential danger or recklessness was not made an issue by the evidence. Nevertheless, we think resolution of this question should have been left to the jury. For this determination the jury would be told to measure the conduct of the defendant against all of the existing circumstances and determine therefrom whether what he did was in its nature dangerous to life or grossly negligent.

368 F.2d at 375 (emphasis and brackets in original). This holding states the common law rule (see note 2 supra) and should be followed by this Court.

There appear to be no other decisions of Federal courts and no Maryland cases considering the existence or limits of the unlawful act doctrine. However, the majority of states which recognize the doctrine at all have carefully limited its effect by one or more qualifications in addition to the causation requirement. In

several jurisdictions the Pardee rationale is followed and only unlawful acts which are inherently dangerous to life will support a manslaughter conviction. People v. Stuart, 47 Cal. 2d 167, 302 P.2d 5 (1956), is such a case, and it discusses the common law as follows:

> Words such as "unlawful act, not amounting to a felony" have been included in most definitions of manslaughter since the time of Blackstone . . . and ever since the time of Lord Hale, "unlawful act" as it pertains to manslaughter has been interpreted as meaning an act that aside from its unlawfulness was of such a dangerous nature as to justify a conviction of manslaughter if done intentionally or without due caution.

Id. at , 302 P.2d at 9. And see, e.g., Dixon v. State, 104 Miss. 410, 61 So. 423 (1913); Brittain v. State, 36 Tex. Crim. 406, 37 S.W. 758 (1896).

Perhaps the most common qualification to the unlawful act doctrine is the malum in se-malum prohibitum distinction. Courts in a great many jurisdictions have held that only acts malum in se are sufficient to sustain a manslaughter conviction. An act which is merely malum prohibitum must either be inherently dangerous to life or be accompanied by additional proof of gross negligence or recklessness. E.g., State v. Yowell, 184 Kan. 352, 336 P.2d 841 (1959) (unlicensed driver caused fatal collision);

People v. Pavlic, 227 Mich. 562, 199 N.W. 373 (1924) (illegal sale of liquor resulted in death from acute alcoholism and exposure); Thiede v. State, 106 Neb. 48, 182 N.W. 570 (1921) (illegal sale of liquor resulting in death from over-indulgence or impurities); State v. Reitze, 86 N.J.L. 407, 92 A. 576 (1914) (illegal sale of liquor caused buyer's fatal fall); State v. Horton, 139 N.C. 588, 51 S.E. 945 (1905) (accidental shooting while hunting illegally); Holder v. State, 152 Tenn. 390, 277 S.W. 900 (1925) (accidental shooting with illegally carried gun). There is a tendency in these cases to consider the inherent dangerousness of the unlawful act as having some relevance to the problem of drawing the line between malum in se and malum prohibitum.

Carrying a gun in violation of a statute prohibiting it or requiring persons carrying guns to be licensed is neither malum in se nor so inherently dangerous as to establish without more the mens rea for manslaughter, and courts in several jurisdictions have so held. One such case, Potter v. State, 162 Ind. 213, 70 N.E. 129 (1904), involved facts strikingly similar to those in the case at bar:

> Appellant and the deceased, as it appears, were friends, and well acquainted with each other, and at times past had been in the habit of engaging in "friendly scuffles." As appellant approached the corner of the streets in question, he was engaged in tossing up a small ball; and, when he came up to the point where the deceased was standing, some friendly conversation or bantering occurred between them in regard as to whether appellant could hit him with the ball which he had been tossing. The talk or bantering between the parties in question appears to have led up to a friendly play or "scuffle," during which a loaded revolver that appellant at that time was carrying concealed in his pocket, or somewhere about his person, was accidentally discharged . . . [causing the death].

Id. at , 70 N.E. at 130. Although it was a misdemeanor for anyone other than a traveler to carry a concealed weapon, the court held erroneous an instruction that such violation was sufficient upon which to base a manslaughter conviction:

> [I]t must appear that the homicide was the natural or necessary result of the act of appellant in carrying the revolver in violation of the statute.

Id. at , 70 N.E. at 131. Since there was no such natural tendency, the conviction was reversed. For other cases involving illegal possession of a gun where similar results were reached, see Dixon v. State, supra;

State v. Nichols, 34 N.M. 639, 288 P. 407 (1930); Holder v. State, supra; Brittain v. State, supra. Cf. State v. Yowell, supra (unlicensed driver); State v. Horton, supra (misdemeanor of hunting on another's land without permission).

The lack of causal connection between appellant's violation of D.C. Code § 22-3204 and the homicide becomes even more apparent upon examination of that section which provides as follows:

> No person shall within the District of Columbia carry either openly or concealed on or about his person, except in his dwelling house or place of business or on other land possessed by him, a pistol, without a license therefor issued as hereinafter provided, or any deadly or dangerous weapon capable of being so concealed. . . .

There is nothing in the record to indicate that appellant could not have secured a license to carry a pistol if he had applied for one, and it is obvious that his failure to procure a license had no causal relationship to the fatal accident. Furthermore, if the accident had occurred on property owned or leased by appellant, he would not have been in violation of section 22-3204, yet carrying a gun there would have involved no more and no less danger to others.

For these reasons it was error to give the unlawful act instruction at all. But assuming arguendo that appellant's violation of section 22-3204 was some evidence of a reckless disregard for human life, it was an even graver error to take that question from the jury and direct a verdict based on that violation.

IV. The above issues were either raised in the trial court or were so clearly erroneous and substantial that, either individually or in the aggregate, they constitute plain error.

The correctness of the definition of negligence which the court put to the jury (discussed in Part I supra) was drawn into question before the jury was charged. The following colloquy took place at the bench:

> THE COURT: . . . . Anything particular in the way of instructions?
>
> Mr. Caputy, you submitted a couple of them.
>
> MR. CAPUTY: I think I have some form of an instruction I think that has been used by other Courts on accident and --
>
> THE COURT: I got the two that you submitted. One was Judge Hart's and the other was Judge Holtzoff's.
>
> I understand, Mr. Moore, that of the two you approve Judge Holtzoff's but not that of Judge Hart.
>
> MR. MOORE: Yes, sir.
>
> THE COURT: I think Judge Hart's is much more applicable with the particular facts of this case inasmuch as it posits the issue of negligence. While the issue of due care if present throughout Judge Holtzoff's charge, it is a little bit buried.
>
> He talks of due care, rather than lack of negligence. But, in any event, I will use one or the other. I will cover the subject matter. I will expect to give the standard charge with all of the constituents with which you gentlemen are very familiar.

> I will charge with respect to the elements of each offense, assuming that all of the offenses are before the Court.

Tr. 71-72. The instructions of Judge Hart and Judge Holtzoff do not appear in the record prepared by the clerk. However, by independent investigation, the undersigned counsel have discovered the two instructions which were apparently under consideration. They are attached hereto as Appendices A and B. The only difference between Judge Holtzoff's instruction (Appendix A), which appointed defense counsel approved, and Judge Hart's instruction (Appendix B), which he disapproved, is the sentence defining negligence in terms of the "reasonably prudent person" which appears in the latter but does not appear in the former. See page 5, supra. The propriety of this standard of culpability was, therefore, brought to the court's attention as is required by Fed. R. Crim. P. 30 and 51. Despite this objection, the court gave Judge Hart's instruction verbatim and thus committed the prejudicial error discussed in Part I supra.

However, assuming arguendo that the error in the instruction on the standard of culpability was not technically objected to and preserved for consideration on appeal, that error and those discussed in Parts II and

III supra each constitute plain error within the meaning of Fed. R. Crim. P. 52(b) and require reversal. The court has a special responsibility for instructing as to the elements of the offenses charged, which responsibility is not shared with counsel to the same extent as rulings on evidence and other matters. Green v. United States, ___ U.S. App. D.C. ___, 405 F.2d 1368 (1968). Accordingly, this Court has repeatedly held that omission of instructions on any essential element of the offense charged is plain error. For example, in Jones v. United States, 113 U.S. App. D.C. 352, 308 F.2d 307 (1962), plain error was found in a conviction of involuntary manslaughter based on the defendant's failure to perform a legal duty of care for an infant. This Court held:

> A finding of legal duty is the critical element of the crime charged and failure to instruct the jury concerning it was plain error.

Id. at 356, 308 F.2d at 311. Similarly, it is plain error to instruct the jury that excessive blows struck in the heat of passion would require a conviction of manslaughter, unless the court qualifies the instruction by adding that an acquittal should result if the defendant reasonably believed under the circumstances that the blows were necessary in self-defense. Inge v. United States, 123 U.S. App.

D.C. 6, 356 F.2d 345 (1966). Omission of any element of the offense from the charge deprives the defendant of a substantial constitutional right to have the jury pass on every essential element of the crime.

> [T]he trial judge's omission to instruct the jury on every essential element of the crime was plain error under Rule 52(b) . . . . By this omission, appellant's substantial right to have the jury pass on every essential element of the crime was prejudicially affected and a new trial is required.

Byrd v. United States, 119 U.S. App. D.C. 360, 363, 342 F.2d 939, 942 (1965) (footnote omitted). For other cases finding plain error in omitting from the instructions one or more elements of the offense, see Screws v. United States, 325 U.S. 91, 107 (1945); Jackson v. United States, 121 U.S. App. D.C. 160, 348 F.2d 772 (1965); Barry v. United States, 109 U.S. App. D.C. 301, 287 F.2d 340 (1961).

If, as all the above cases hold, it is plain error to omit an essential element from the instructions, it is a fortiori plain error to include an erroneous instruction on such elements.

It is entirely possible that, had it been properly instructed on the standard of culpability, the burden of persuasion, and the unlawful act doctrine (or any one of these issues), the jury would have found appellant not guilty.

Rational inferences drawn from evidence in the record would certainly permit the jury to conclude that, although appellant may have been negligent, there was a reasonable doubt as to whether he was grossly negligent or reckless. And, although appellant was found guilty of carrying a pistol without a license, the jury could have been uncertain whether that forbidden conduct was the direct cause of death or whether it manifested a reckless disregard for human life.

CONCLUSION

For the reasons stated, the judgment of conviction of manslaughter under Count 2 of the indictment should be reversed and a new trial ordered.

Respectfully submitted,

Fred D. Turnage
Roger D. Chittum

1250 Connecticut Avenue, N.W.
Washington, D.C. 20036
Tel. 223-2151

Attorneys for Appellant
(Appointed by this Court)

APPENDIX A

Judge Hart's Instruction on Manslaughter by Negligence in Handling a Firearm

Generally manslaughter is defined as the unlawful killing of a human being without malice.

If a person is negligent in the handling of a firearm or other dangerous instrumentality and death results from that negligence, then the person guilty of negligence is guilty of manslaughter. The fact that there was no intention to do any harm is immaterial, if the defendant was negligent and death resulted from his negligence. Negligence may be defined as the going [sic] of some act which a reasonably prudent person would not do or the failure to do something which a reasonably prudent person would do, actuated by those considerations which ordinarily regulate the conduct of human affairs.

APPENDIX B

Judge Holtzoff's Instruction on Manslaughter by Negligence in Handling a Firearm

Generally manslaughter is defined as the unlawful killing of a human being without malice.

If a person is negligent in the handling of a firearm or other dangerous instrumentality and death results from that negligence, then the person guilty of negligence is guilty of manslaughter. The fact that there was no intention to do any harm is immaterial, if the defendant was negligent and death resulted from his negligence. What constitutes negligence is a question of fact to be determined by the jury.